Office-Supreme Court, U.S.
FILED
MAY 24 1967
CLERK

LIBRARY

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, A CORPORATION AND OTTER TAIL POWER COMPANY, A CORPORATION

Petitioners

VS.

RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, AS ADMINISTRATOR OF THE RURAL ELECTRIFICATION ADMINISTRATION; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND JOHN DOE AND MARY ROE, WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFFS

Respondents

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KENNETH W. GREEN
JOE A. WALTERS
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
CYRUS A. FIELD
Fergus Falls National Bank Building
Fergus Falls, Minnesota
DONALD E. NELSON
ARLAND D. BRUSVEN
414 Nicollet Avenue
Minneapolis, Minnesota 55402
Attorneys for Petitioners

Dated: May, 1967.

333-3539 Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415 333-3530

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, A CORPORATION AND OTTER TAIL POWER COMPANY, A CORPORATION

Petitioners

VS.

RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, AS ADMINISTRATOR OF THE RURAL ELECTRIFICATION ADMINISTRATION; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND JOHN DOE AND MARY ROE, WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFFS

Respondents

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARGUMENT

The Administrator's insistence in characterizing his regulations and procedure as mere "policy"[1] shows only that

[1]A characterization rejected by the Federal District Court and either rejected or regarded as meaningless by the Eighth Circuit Court. The

he will continue to claim that denial of standing here or denial of certiorari in *CLECO*[2] represented victory on the merits of this misguided contention. The issue here should not be perverted by such an effort. Nor should it be obscured by the Administrator's attempts to garble it by reference to claimed "standing predicated solely on competitive injury".[3]

> "This loss is not the incident of more effective competition. * * *. It is injury inflicted by denying to the plaintiffs equality of treatment." Brandeis, J. in the *Chicago Junction Case*, 264 U.S. 258.

Kansas City Power & Light Co. v. McKay, 225 F. 2d 924, cert. den. 350 U.S. 884, is commended to this Court by the Administrator as authority not on the basis of its soundness or application but on the basis that it is more than ten years old. In suggesting a comparison with *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, the Administrator unwittingly directs attention to the serious question whether *Kansas City* conforms to the reasoning in *Sanders*.[4] Certainly *Kansas City* and the Court that decided it do not support respond-

---

persistence in this misclassification dramatizes the executive arrogance ["unreviewable discretion"] of respondents. Judicial abnegation of review has only nurtured this attitude.

[2] *Rural Electrification Administration v. Central Louisiana Electric Co.*, (5th Cir. 1966) 354 F. 2d 859, cert. den. 385 U.S. 815.

[3] Both the Federal District Court and the Eighth Circuit Court disregarded the Administrator's persistent claim that this was the sole basis of claimed standing.

[4] If the Comptroller General is correct that economies were lost or ignored by the Administrator's decision is the Eighth Circuit's implied suggestion that the consumer, not petitioners, have standing realistic in light of *Sanders*?

ents' position in this case[5] *Kansas City's* only real value here is to underscore the fact that since *Kansas City* was decided the Administrator has seen the adoption (at Congress' behest) of his regulations with which he now says the courts are powerless to force compliance. Whether Congress' purpose be to protect the "suppliers" such as petitioners from competition or only to insure their fair treatment and the economical expenditure of government funds in recognition that both companies such as petitioners and the cooperatives are to co-exist is a vain quibble.

Petitioners' recognition as a class is clear. That Congress' directions to the Administrator to adopt the regulations here evidences a purpose is inescapable. Neither the Act nor the regulations preclude judicial review. Petitioners' treatment "* * * without compliance with procedures * * *"[6] must be conceded. Thus standing within the meaning of *Sanders* is manifest.

There is no real difference between *Kentucky Utilities*[7] and the instant case. In one case standing is predicated on statutory amendment, and in the other it is predicated on regulation. Both are law which even the Eighth Circuit recognized *should* be followed. With *Kentucky Utilities* now under review by this Court, certiorari in the instant case should be granted.

We cannot share the Eighth Circuit's apparent view that we are in an area "where generally the Executive and the legislative are supreme" when the issue is one of fair treat-

---

[5]A careful comparison of *Pennsylvania Railroad Co. v. Dillon*, D. C. Cir., 335 F. 2d 292, with *Gonzales v. Freeman*, D. C. Cir., 334 F. 2d 570, can lead only to this conclusion.

[6]Respondents' Brief, p. 4.

[7]Cert. granted on March 28, 1967, No. 1063, O.T. 1966.

ment, not technical decision. In that area, the courts are still supreme.

Respectfully submitted,

KENNETH W. GREEN
JOE A. WALTERS
CYRUS A. FIELD
DONALD E. NELSON
ARLAND D. BRUSVEN
Attorneys for Petitioners

Dated: May, 1967.